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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

JOHN K. YEE AND IRENE YEE, ET AL.,
Petitioners,
vs.
CITY OF ESCONDIDO, a municipal corporation
Respondent.

On Certiorari to the
California Court of Appeal
Fourth Appellate District, Division One

BRIEF OF ESCONDIDO MOBILEHOME OWNERS' POSITIVE ACTION COMMITTEE AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the rent adjustment provisions of Proposition K which permit landlords to seek periodic rent increases, without limitation as to frequency or amount, on sale of mobilehomes makes the ordinance so distinguishable from the Santa Barbara and Los Angeles ordinances examined by the Ninth Circuit in *Hall v. City of Santa Barbara* (9th Cir. 1987) 833 F.2d 1270 and *Azul Pacifico, Inc. v. City of Los Angeles* (9th Cir.) 1991 U.S. App. Lexis 26335, 91 Daily Journal DAR 13599 as to render the analysis of those cases inapplicable.

2. Whether the Ninth Circuit's failure to acknowledge and examine the effect of park owners' quasi-monopolistic power to demand excessive (over market) rents in non-rent-control parks and thereby force residents to sell their homes at depressed prices renders the "premium" analysis of *Hall* and *Azul* erroneous.

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This brief is submitted with both parties' written consents which have been filed with the Clerk of the Court.

INTERESTS OF THE AMICUS CURIAE

Escondido Mobilehome Owners' Positive Action Committee ("EMPAC")[1] is a non-profit association comprised of mobilehome owners in Escondido who drafted, sponsored and eventually obtained voter approval for Proposition K. Following the enactment of Proposition K, EMPAC continued in existence as an oversight committee of local park resident organizations. EMPAC is intimately involved in assisting homeowners in their dealings with park owners. It participates on their behalf in many of the hearings before the rent-control board; its officers advise mobilehome owners and park resident organizations of their rights under Proposition K and the manner in which the ordinance applies to protect these rights; EMPAC also employs counsel, such as the undersigned, to participate in litigation between homeowners and park owners for the purpose of insuring that the rights guaranteed to park residents under this legislation are given effect.

For these reasons, EMPAC is uniquely qualified to explain the homeowners' side of the issues; namely, the conditions which existed in Escondido mobilehome parks prior to the enactment of Proposition K, the reasons which motivated EMPAC's constituency to seek legislative protection, why Proposition K was necessary, and how Proposition K was intended to and is in fact being applied. Of all of the participants in this appeal, EMPAC can best explain why in this particular municipality some form of legislation was needed to balance the equities between the owners of mobilehome parks and the mobilehome owners who lived in them, and how Proposition K

[1] At the time the ordinance was enacted EMPAC stood for Escondido Mobilehome Owner's *Political* Action Committee.

operates to affect that balance, and what would happen to the largely elderly population of mobilehome residents living in Escondido if the protections afforded by Proposition K were withdrawn.

SUMMARY OF ARGUMENT

EMPAC is aware that others including respondent will discuss in a detailed and able manner the "taking" issues fundamental to this lawsuit and will, in this process, invite the Court's attention to the existing legal framework of applicable case law and precedent. EMPAC sees *no* need to repeat these arguments. Rather it will seek to elucidate a different aspect of the controversy in the hope that a view from another perspective may provide insights to the Court not available through more traditional technical approaches.

Proposition K is significantly distinguishable from the two ordinances discussed in *Hall v. City of Santa Barbara* (9th Cir. 1987) 833 F.2d 1270 and *Azul Pacifico, Inc. v. City of Los Angeles* (9th Cir.) 1991 U.S. App. Lexis 26335, 91 Daily Journal DAR 13599. Notwithstanding the reasoning of *Hall* and *Azul*, Proposition K does not affect a taking under the principles enunciated in those two cases. Unlike the ordinances in *Hall* and *Azul*, Proposition K contains an effective rent adjustment provision operative upon the occurrence of a vacancy which allows a park owner to seek and obtain a rent increase. Thus, the ordinance here under consideration incorporates a form of vacancy decontrol which provides a balanced approach to the protection of the rights both of the park owners and the homeowners. Proposition K permits the park owner to seek a rent increase when a mobilehome is sold and if the sale includes a premium of the type envisioned by *Hall* and *Azul*, it allows the park owner to base his request for a rent increase on that

premium. Because of this adjustment feature, premiums[2] will be eliminated or at least minimized and therefore the benefits of the rent-control ordinance will be passed on to succeeding generations of homeowners.

The court which decided *Hall v. City of Santa Barbara, supra*, and *Azul Pacifico v. City of Los Angeles, supra*, based its analysis on unwarranted assumptions with respect to "market," "monopolies," and "value comparisons" which are not borne out by real world considerations of mobilehome park living. Specifically, it assumed that the artificially depressed prices at which mobilehomes are sold in non-rent-control parks were "market" prices and should be used as a bench mark from which to measure the premiums supposedly resulting from the sale of mobilehomes in rent-control parks. The observed higher price brought by sale of a mobilehome in a rent-control park is primarily a consequence of values taken by park owners from

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[2]The term "premium" is used here, and at times throughout the remainder of this brief, in the sense that it is used in *Hall* and *Azul* as denoting an observed differential between the sales price of mobilehomes in rent-control and non-rent-control parks resulting from rent-control depressed rents. However, EMPAC expressly disavows any implication that by adopting the terminology of *Hall* and *Azul* it concurs with the reasoning of those cases. Observed differences in the sales price of mobilehomes can be the result of a multitude of factors. For example, there is an in-place "locational value" of mobilehomes in parks attributable to transportation, assembly and related costs never evaluated in *Hall* or *Azul*; inflation causes premiums; premiums can result from differences in the financing costs of homes, the condition of homes and landscaping, the quality of the homeowners' association in a park to name just a few factors. Further, all that can be observed is the price *differential*, not its cause. EMPAC asserts that the sales price differential is caused by excessive rents in non-rent-control parks and fully supports the briefs of respondent and other amici which argue the takings analysis of *Hall* and *Azul* is fatally flawed and should be rejected by the Court.

homeowners in non-rent control parks through the exercise of the landlord's quasi-monopolistic power and not from depressed rents in parks subject to rent control. As a consequence of these invalid assumptions, the Ninth Circuit's reasoning is flawed and resulted in the erroneous conclusions reached in *Hall* and *Azul*. This Court should thus reject the analysis of those two cases and instead approve the reasoning of the California Fourth Appellate District in *Yee v. City of Escondido* (1990) 224 Cal.App.3d 1349.

BACKGROUND

To fully appreciate the significance of the issues raised in *Hall* and *Azul*, it is necessary for the Court to be aware of why the voters of Escondido adopted Proposition K.

Escondido has 28 mobilehome parks containing an aggregate of approximately 3,100 mobilehome spaces for rent. In the early 1980's there were virtually no vacancies in these parks. As a consequence, park owners began to raise rents, sometimes to unconscionable levels.[3] If the mobilehome owners complained, the usual answer was - "take it or leave it"; "leaving it" of course meant moving out if a vacancy could be found anywhere within a reasonable distance. However, moving a

[3]On August 31, 1983, Vista Verde Mobilehome Estates was sold. Effective December 1, 1983, the new owner raised park rents by more than 30% over the prior year's rent. In December 1987, Westwinds Mobilehome Lodge was sold. Effective March 1, 1988, the new owner increased rents by more than 30% over the prior year's space rent. Rent increases of between 30 to 40% of existing rents are not uncommon on sale of mobilehome parks in Escondido and on several occasions, rent increases in these ranges have been initiated by existing owners. This information is based upon facts obtained by the undersigned counsel in other litigation involving mobilehome park rent disputes in San Diego County (Escondido) and from EMPAC records.

mobilehome costs approximately $10,000.[4] The residents who were mostly elderly, and mostly living on fixed incomes faced a difficult dilemma. They could either accept excessive rents imposed by their landlords which meant a steadily eroding standard of living or they could try to move their homes if they could afford to do so and find a place in some park. A third alternative, selling their homes, was also possible, but if they chose to sell their mobilehome to a new incoming resident, the park owners invariably imposed an additional rent increase on the buyer. This demand for increased rent on sale was also presented on a "take it or leave it" basis with no bargaining opportunities; therefore homeowners were unable to sell their homes without adjusting the sales price downward to compensate for the park owners' excessive rental demands so that the incoming resident could afford to buy the home and pay the space rent demanded by the park.

The park owner whose resident desired to sell had little or no economic motive to facilitate the transaction. He was obtaining rent at the current level from the existing homeowner and thus, whether a new resident moved in was only of concern to him if the new homeowner could be made to pay higher rent. If the existing resident was elderly and became ill or died, it made no difference. Whether the resident lived in the home was irrelevant; as long as the home was on the space, rent had to be paid and the payment of the rent was guaranteed by the value of the existing resident's home.[5]

[4]The estimate of $10,000 is based on counsel's experience and opinions of MAI appraisers developed in litigation pertaining to other parks in the area.

[5]Petition, Appendix D; see Cal. Civ. Code §798.78.

In short, prior to Proposition K, economic power was concentrated almost exclusively in the hands of the park owners. The homeowners' only way to preserve for themselves some portion of their investment in their homes was to organize and create a more favorable regulatory climate by seeking legislation which imposed restrictions on the otherwise unlimited economic power of their landlords. As a consequence, a rent-control initiative for mobilehome parks was put on the ballot in 1984. It lost. But in response to the rapidly deteriorating conditions for the mobilehome owners, EMPAC was formed.

Conditions in the parks did not improve. The City Council of Escondido urged park owners and park residents to come together and attempt to negotiate solutions. It was, however, futile. The City Council then asked five prominent businessmen to confer and propose solutions. EMPAC/homeowners reluctantly accepted the resulting compromise recommendations although they included highly unfavorable provisions; the park owners, however, rejected the suggested solution. Thus the stage was set for another voter sponsored rent-control initiative. The stakes were high. The park owners sponsored a "counter" initiative and spent $200,000 to promote it and also to attempt to defeat Proposition K. In 1988, they failed in both efforts by a 2-1 margin. Proposition K passed. Perhaps not surprisingly the park owners have since refused to give the ordinance a fair chance to work, apparently preferring to use the legal system to attack and destroy it and thereby regain their former unrestricted power over rents.

The officers and directors of EMPAC are all residents/mobilehome owners in Escondido mobilehome parks. They receive no compensation for their services. Jerry Lenhard, president since November 1987, is a retired machinist who spends more than 70% of his time helping homeowners to deal with the inevitable and difficult problems of mobilehome park living including, but not limited to, rent-control issues.

ARGUMENT

I. Proposition K Permits Increases of Space Rentals on the Sale of a Mobilehome to an Incoming Resident and Is Therefore Distinguishable From the Ordinances in *Hall v. City of Santa Barbara* and *Azul Pacifico v. City of Los Angeles* and Passes Cons' utional Muster.

Proposition K differs significantly from the ordinances examined in *Hall* and *Azul* and thus the taking analysis which is the gravamen of those cases is not applicable to the Escondido ordinance. The ordinances considered in *Hall* and *Azul* contain provisions which allow only limited rent increases. Caps were set both on how often and how much space rent could be increased by a landlord in a given year. In *Hall*, the Santa Barbara ordinance permitted landlords to increase the rent unilaterally only once a year by 3% or by 3/4 of the CPI increase, whichever was greater. A larger increase required arbitration. In addition, whenever a space became vacant, under the Santa Barbara ordinance, the landlord was restricted to a rent increase not to exceed 10%.[6] Thus, the amount and frequency of rent increases was restricted, both on an annual basis and when a vacancy occurred. Moreover, the Santa Barbara ordinance required park owners to give leases of indefinite duration.

In *Azul*, the initial ordinance prohibited landlords from raising space rents when mobilehomes were sold. That provision was repealed and the ordinance amended to allow landlords to raise rents on the occurrence of a vacancy but restricted such rent

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[6]It is not clear whether "vacant" under the Santa Barbara ordinance means removal of a mobilehome from a space or sale of a mobilehome in place; but presumably either alternative would satisfy the requirement (*Hall v. City of Santa Barbara, supra*, 833 F.2d 1270, 1273 fn. 3).

increases to the highest rent charged for a comparable space in the same park or 10%, whichever was less.[7]

In contrast, section 4 of Proposition K permits park owners to seek rent increases without limitation as to frequency or amount. All a park owner need do is to make an application to the rent-control board setting forth the basis for his asserted right to an increase. There are some 11 criteria which the board must consider in passing upon such applications. They include changes in the CPI, capital improvements made by the landlord, increased cost and maintenance, taxes, utility charges to the extent they affect park owners, need for repairs, and the like. However, in addition to the enumerated criteria, Proposition K provides that the board shall consider "... any other factors it considers relevant. . ." in determining whether or not an application for a rent increase should be granted.[8]

Thus, unlike the Santa Barbara and the Los Angeles ordinances, the board under Proposition K is permitted to consider the sales price received by homeowners on the sale of their mobilehomes as a factor affecting its determination of rents on the space on which the home is situated. It is also important to note that under Proposition K there are no limits as to how often and how much of an increase a park owner can obtain; the landlord is not restricted to once a year rent increases or to rent increases based upon the occurrence of designated events; i.e. such as tax increases. In fact, he is free to ask for a rent increase with respect to a single space in his park or indeed on all spaces

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[7]It appears that under the Los Angeles ordinance rent increases were permitted on the sale of a mobilehome (*Azul Pacifico v. City of Los Angeles, supra*, 91 Daily Journal DAR 13599, 13599).

[8]Joint Appendix pp. 7, 11.

in the park on the sale of a single mobilehome to a new homeowner if he deems the facts of that sale relevant to the establishment of new space rental levels. Since all relevant factors must be considered, if a "premium"[9] is paid by a buyer of a mobilehome, it can be used by the landlord to support his application for a rent increase.

Thus, a park owner can present to the rent-control board evidence of the alleged premium at which mobilehomes in his park are selling and/or the premium at which any particular home in his park sold; and he can argue the existence of such a premium is an indication that rents in the park are unfairly low and that a rent increase on that space, or on all spaces, is in order.[10] The unique provisions of Proposition K permit the rent-control board to evaluate on a case by case basis individual sales of mobilehomes within a given park and to make adjustments in the dynamic between homeowner and landlord rights in that park based upon the economic factors of such sales. Obviously, the existence of this adjustment mechanism, which can be activated by a premium paid by the incoming homeowner in connection with the purchase of the existing resident's home, precludes or at least minimizes most of the evils of monetized premiums envisioned by the Ninth Circuit in *Hall* and *Azul*.

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[9]The term "premium" as used here means a premium of the type described in *Hall* and *Azul*; i.e. an enhancement of the mobilehome sales price over its fair market value resulting from depressed space rents. EMPAC does not believe that any such premiums have ever occurred in the sale of Escondido mobilehomes. Also, see footnote 2.

[10]Of course, homeowners will be permitted to dispute the existence of such a premium and/or argue it is attributable to other factors. See footnote 2.

Because rent increases can be awarded where depressed rents result in premiums on sale of mobilehomes, the mere possibility of such increases will logically tend to eliminate the payment of such "premiums." Thus, few if any premiums will be paid for mobilehomes and, since the sales price of mobilehomes will be restricted to fair market levels, nothing of value will be taken from the landlord and given to the existing residents. The landlord will be able to obtain a fair space rent and the homeowner will receive only the fair market value of her home; she will not be able to "monetize" the benefits of unfairly depressed rents and appropriate these values for herself as a part of the sales price of her home. Under Proposition K, there can be no "taking" of the type described in *Hall* and *Azul*.

The secondary consequence of this adjustment mechanism is that under Proposition K the benefits of rent control will be passed on and enjoyed by successor purchasers of mobilehomes. Proposition K does not result in increased occupancy costs to successor residents and thus deny them the benefits of rent control. It enables the rent-control board to "fine tune," on a transaction by transaction basis, the respective rights of the landlord and residents in a given mobilehome park in order to establish and maintain an equilibrium fair to both. The landlord and the homeowners will each be allowed to preserve their equities in their respective property and overreaching by each will be curbed. The *Hall* and *Azul* analysis is simply not applicable to the Escondido rent-control ordinance.

In sum, Proposition K significantly differs from the ordinances considered in both *Hall* and *Azul* where park owners were subjected to limitations in both amount and frequency of rent increases (*Hall v. City of Santa Barbara, supra*, 833 F.2d 1270, 1273, fn 3, and *Azul Pacifico v. City of Los Angeles, supra*, 1991 U.S. App. Lexis 26335, 91 Daily Journal DAR 13599, 13599). The ordinance allows the rent-control board to adjust the equities and balance the park owner's right to a fair rent with

the homeowner's need to be free of rent gouging and to protect the equity in her home.

EMPAC strongly disagrees with the premises of *Hall* and *Azul* and the reasoning and conclusions based thereon and urges this Court to reject the same. However, even if the Court accepts the takings analysis of the Ninth Circuit, the feedback adjustment mechanism built into Proposition K precludes takings of the type described in *Hall* and *Azul*. Certainly on the record before the Court, and in view of the specific language of Proposition K permitting space by space rent increases in mobilehome parks, and by reason of the adjustment mechanism built into the ordinance enabling the rental control board to use mobilehome sales premiums resulting from inadequate rents as a basis for rent adjustment, and petitioners' failure to even attempt to utilize the ordinance's procedures to seek a fair rent increase, it would be inappropriate for the court to find that the enactment of Proposition K amounts to a per se taking.

II. "Takings" and the Economics of Mobilehome Parks.

A. It Is Improper to Use the Sales Prices of Mobilehomes in Non-Rent-Control Parks as the Basis for Computing "Premium" on the Sale of Mobilehomes in Rent-Control Parks.

Hall and *Azul* rely upon resale price guides and empirical studies to establish the existence of a differential between the sales price of mobilehomes in non-rent-control parks and the prices at which similar homes are sold in parks subject to rent control. The opinions simply assume that the sales price of mobilehomes in non-rent-control parks is determined by classical forces of supply and demand operating within a relatively Laissez Faire economic environment and conclude that the observed sales

price differential is a consequence of suppressed rents (i.e. rents below market) in mobilehome parks subject to rent control. The assumption is invalid and the conclusion erroneous.

Unlike the theoretical "free market," where the opposing forces of supply and demand interact to produce a multi-layered spectrum of price equilibria, the prices at which mobilehomes in non-rent-control parks can be sold is determined to a large extent by park owners by the levels at which they establish space rentals. Since space rentals are imposed in non-rent-control parks by the landlord's exercise of quasi-monopolistic power, it is error to use the impaired sales price of mobilehomes resulting from the exercise of this power as the bench mark from which to measure a supposed differential between "free market" sales prices and sales prices of mobilehomes in rent-control parks.

As Judge Kozinski observed in *Azul*, the so-called denizens of mobilehome parks are for the most part lower income strata individuals. Typically, their single most important investment and often their only asset of any substantial value is their home. Rich people by and large do not live in mobilehome parks.[11] In *Azul*, Judge Kozinski hypothesizes that a given individual may have $1,000 per month to spend on housing and that it makes no difference to her whether she pays $800 per month for her mobilehome and $200 per month for rent or vice-versa. The important fact is that the combination of the two expenses not exceed $1,000. The *Yee* court describes the relationship between the rent and the sales price of mobilehomes as "complementary" and it appears that Judge Kozinski agrees

[11]Except in those few ocean front parks where mobilehomes are used as vacation homes; Azul Pacifica is believed to be such a park. The economic analysis described above is not intended to apply to these second home luxury parks.

with this analysis.

However, neither *Hall* nor *Azul* investigate the consequences or find relevant the homeowner's downside of the inverse relationship between space rental levels and mobilehome sales prices. That is, a great deal of judicial effort is devoted to the development of the "premium" analysis resulting from rents artificially maintained at below market levels in rent-control parks and how this adversely affects park owners' property rights, but almost nothing is said about what happens to the sales price of mobilehomes in non-rent-control parks, when space rentals become excessive.

Using Judge Kozinski's own logic, as space rent increases the monthly amount which a purchaser has available for mobilehome payments declines. Thus, the power to raise rents without restriction constitutes the power to destroy the equity of the resident in her mobilehome. Consider the alternatives of a mobilehome owner living in a non-rent-controlled park where the landlord raises rents $100 per month in excess of market.[12] She can: (1) pay the $100 per month rental premium demanded by the landlord; or (2) move her mobilehome out of the park; or (3) sell her mobilehome; or (4) default in the payment of rent.

As Judge Kozinski recognizes in *Hall* and *Azul*, mobilehomes are mobile in name only. It is expensive to move a mobilehome, assuming there is some place to move it to. For

[12]The use of the term "market" here is intended to describe the classical market concept in which the buyer (the incoming resident) is willing to buy a mobilehome but is not required to do so and the seller (the outgoing resident) desires to sell her mobilehome but is not compelled to do so. EMPAC asserts that such a market exists in mobilehome parks only in rare circumstances. See pages 18-20 of this brief. Nevertheless, it seems to be the concept Judge Kozinski uses.

example, there are no vacant spaces in Escondido or vicinity to which a mobilehome may be moved. Moving a mobilehome out of an Escondido mobilehome park generally means relocation to the desert, some 80 miles inland (or farther), a climate not well tolerated by most elderly people. Even assuming a place to move the home exists, it costs approximately $10,000 to disassemble the home, load it on to specially designed trucks, transport it to the new location, and reassemble it.[13] Most people who live in mobilehome parks do not have sufficient cash or credit to enable them to move their homes. Further, all of the amenities installed (or purchased) by the homeowner who is moving (such as porches, sheds, driveways, landscaping, barbecues, etc.) will be lost (forfeited to the landlord or destroyed in the moving process).[14] Finally, if the move is to another "non-rent-control park," the moving homeowner has no assurance that the new park owner will not within a few months/years, etc. do exactly the same thing as the existing landlord (raise rents to a level in excess of market). Therefore, option two is usually not viable.

Option three has already been discussed. When a rent increase occurs, the price at which a mobilehome can be sold declines. Like the opposite ends of the teetertotter, when space rent goes up, sales price inevitably comes down and these two factors operate in tandem in a relationship defined by well-established economic rules. As a consequence, if the landlord raises rent in a mobilehome park to an amount $100 in excess of market, he appropriates from the selling homeowner the capitalized value of the excess rent over the useful life of the

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[13] Again, the estimate of $10,000 is based on counsel's experience and opinions of appraisers in relationship to other parks in the area.

[14] See Cal. Civ. Code §798.55 subd. (a); Petition, Appendix D.

mobilehome resulting in the transfer from the outgoing resident to the landlord of that portion of the equity of the selling resident's home represented by the discounted value of this income stream. The amount of equity lost by the outgoing homeowner depends upon the size of the differential between the rent imposed upon the new resident and market rent. The larger the deviation from market rent, the greater the loss the outgoing homeowner will have to bear. Except in those rare cases where the space rental premium (the differential between the market rent and the amount charged by the landlord) is relatively small, selling is not an acceptable solution to a homeowner subjected to an unfair rent increase.

Obviously, defaulting is not an acceptable alternative either for this results in the outgoing homeowner's loss of the entire equity in her home. This leaves as the only realistic alternative option one, i.e. to pay the excessive rent and this is the choice almost universally made by residents subjected to excessive rent increases by unscrupulous landlords in non-rent-control mobilehome parks.

How often is this scenario played out by the participants in mobilehome living? After all, it is unrealistic to assume that all landlords are rent gougers. Surely there are some who will not take advantage of elderly residents who usually cannot afford to hire lawyers to defend themselves. The answer to the question is -- always; it's just a matter of time. The underlying economics are inevitably determinative. Consider for example a 100 space park where the park owner raises rent $100 per space in excess of market. This translates to a $1200 per year premium per space. For the 100 spaces in the park this constitutes an aggregate rent premium ("bonus value") of $120,000 per year ($1200 x 100 spaces). The capitalized value of this bonus value income stream is more than $1,000,000 (ten times earnings). If the current landlord is too squeamish to raise rents and watch the resultant suffering (elderly residents who cannot afford to heat their homes

or light them; people living on subsistence diets, etc.) his successor will not be. The current owner will simply sell the park (and realize in the process a substantial part of the incipient bonus value) and the new landlord will (again) raise the rent. It is a story endlessly repeated in the mobilehome park world.

As may be seen from the above analysis, there are no mom and pop mobilehome parks -- there are only rent-control and non-rent-control mobilehome parks and the latter living arrangement has created the last of the feudal lords. The landlord of a non-rent-control park holds his homeowners hostage; they cannot escape except at great expense, by paying a moving cost most of them cannot afford and by moving to a climate many of them cannot tolerate. Thus, he makes such park rules as suit his purpose, with no contrary voice ever heard. When he raises the rent, he establishes by that process the amount a resident who desires to sell (and often because of the inevitable result of the process of aging, must sell) can realize for her mobilehome. Thus, by his largess or his desire to punish or most often, as a result of a willingness to engage in rent gouging, the landlord decides whether the selling resident escapes with part of her equity in her home or is pauperized.[15]

The mobilehome park business is not a "mom and pop" type operation. It is big business and generates large amounts of money. A million dollar premium is what you can derive from a typical "mom and pop" mobilehome park by simply raising the

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[15]In many mobilehome parks the end result of the process over time is the landlord's acquisition of the residents' mobilehomes for salvage value costs.

rent $100 a month more than market.[16]

B. The Geographical Market as *Azul* Describes It Does Not Exist.

The court in *Azul* rather cavalierly dismisses the argument of the City of Los Angeles that a monopoly existed in the mobilehome market. The court states it would be impossible to establish a monopoly in the rental market and uses the State of California as a geographical example.

As the foregoing analysis indicates, whether a "free market" in mobilehome sale prices in fact exists is open to question. However, the court's example in *Azul* is in any event inappropriate. The market for mobilehomes which the interested buyer searches out is typically a local market consisting of one mobilehome park or group of mobilehome parks in a geographically limited area. Certainly it is not usual for someone interested in purchasing a mobilehome to search the entire state.

Logic alone tells us that a monopoly situation can exist within one park with no vacancies, or within a community with numerous parks with no vacancies. The fact that mobilehome parks with vacancies may exist in northern California or even in

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[16]Some of the opposing Amici refer to so called "mom and pop" mobilehome parks raising images of the corner grocery store owner just eking out a living. In fact, mobilehome parks have been a preferred investment of real estate syndications for many years. These syndications, many of which are registered tax shelters, are typically absentee owners. They usually include wealthy, passive investors who favor mobilehome park investments for there stability of income; (mobilehome parks, once full, are almost never vacant); recession-proof resilience to downturns in the economy (most mobilehome park residents are pensioners); low maintenance (unlike apartments, the typical park has minimal improvements), and the ability to consistently increase income by raising rentals and thereby enable investors to realize substantial profits over relatively short term holding periods.

Orange County does not relieve Escondido (or southern California) mobilehome park residents or prospective purchasers from the kind of economic pressures described above. In non-rent-control venues, the park owner has the economic power, within his park, to fix rents and the exercise of this power is in no way mitigated or tempered by the traditional forces of supply and demand. EMPAC asserts that the rents established by the exercise of such power are monopolistically determined and the resulting negative effect on the sale prices of mobilehomes within such parks amounts to nothing less than the taking by the landlord of the homeowner's equity in her home. In any event, the economic attributes of such a park are not "free market" derivatives and it is simply erroneous to use depressed mobilehome sale prices resulting from such rents as the basis for the value/price comparison in which the Ninth Circuit engages.

If rents in the typical non-rent-control mobilehome park exceed "market" as a consequence of the exercise of monopolistic power, as EMPAC asserts, then what does this ephemeral concept really mean in the context of mobilehome park economic life? Do market rents in the sense of a classically competitive market ever exist in mobilehome parks? EMPAC asserts they may -- but only in the so-called "fillup" stage of development of certain mobilehome parks.

A new mobilehome park, which is in the process of "fill-up" has the need, like any other business, to compete for customers if there are other mobilehome parks in the area with vacant spaces. It is only in this unusual situation that the mobilehome park owner cannot dictate terms to incoming homeowners. Therefore, competitive market rules do apply, but only to those parks in "fillup" who are faced with competition from vacant spaces in other nearby parks.

However, even in such mobilehome parks, the price at which a mobilehome will sell is not entirely determined by objective market forces. The mobilehome park owner in a park

in the process of fillup is also a competitor of those existing residents who desire to sell their homes. Obviously, both the landlord and the homeowner who wants to sell are looking for buyers. The landlord would prefer the buyer to purchase a new home and to move it into his park as that would fill up one more space. Therefore, he would be inclined to offer the prospective buyer incentives such as setting the rent on a new space at a lower level than the space rent for an incoming homeowner buying a resale home. After all, the existing resident isn't going anywhere -- it's not as if she can afford to move her mobilehome. As long as her home is unsold and sits on the pad, the existing homeowner must pay rent. Therefore, the landlord has little to gain by facilitating the sale of her home and no incentive for keeping the rent on resales low. However, until the park is full, he cannot raise the rents of existing homeowners too high -- because if existing homeowners become too unhappy they might inform incoming residents of the problems within the park and that would be bad for the rental of the remaining spaces. Therefore, the landlord in a park in a fillup situation rents empty spaces for somewhat less than he will charge an incoming resident for space rent on a space presently occupied by a home purchased by that incoming resident. He also moderates his rent increases to existing residents until the park is full. At that point, the only restraining force on rent increases is that the landlord can't raise rents to a level which would make it economically advantageous for a homeowner to incur the $10,000 it costs to move her home, if she can find a place to move it to. Absent a disaster, mobilehome parks once full are never again empty and the landlord has the full security of the resident's home to guarantee that rents will be timely paid. The "free market" as Judge Kozinski envisions it simply does not exist in mobilehome parks.

C. The Efficacy of Rent Control.

The resident/mobilehome owners' only answer to all of this is political. It is only through organizations like EMPAC that they have any chance of redressing the balance. The homeowners are usually not politically sophisticated. They are not retired judges or lawyers or doctors or businessmen. They are typically retired factory workers, or farmers, or policemen, or school teachers, or government clerks. Their working life has not often brought them into the political forum and most of them cannot afford to hire the sophisticated assistance they need to compete with the political clout generated by the landlord's wealth and power. Therefore, with a few notable exceptions, in California homeowners have generally only been successful in passing rent-control laws in small cities like Escondido. Even there, they were not able to induce their local city council to adopt such an ordinance. It was only by recruiting old ladies to sit at tables in shopping malls and solicit signatures to place the rent-control initiative on the ballot that they were finally able to enact rent control.

Proposition K is not a retaliatory measure. It does not attempt to punish mobilehome park owners for past transgressions. It simply limits rental increases to amounts that are fair and reasonable. The ordinance was promulgated in an effort to restore some semblance of fairness and balance to the mobilehome park world by allowing homeowners to preserve a part of the equity in their mobilehomes that would otherwise be taken from them by their landlords' excessive, unrestricted rent increases. The analysis of *Hall* and *Azul* ignores all of the above. It uses the artificially low sale prices of mobilehomes resulting from the landlord's ability to control space rentals in non-rent-control parks as the measure of the landlord's damages.

Hall and *Azul* make public funds available to compensate landlords whose parks have been subjected to rent control for the loss of their former victims. In addition, inexplicitly *Azul* holds

a public entity cannot escape the ravages of its taking analysis. According to *Azul*, if Escondido were to repeal Proposition K tomorrow, the park owners would still have to be compensated for the loss of the rental premium income stream they would have been able to extract from the residents of these parks absent rent control -- because according to *Azul*, the taking occurs not when the mobilehomes are sold, but upon the passage of Proposition K. Therefore, under the *Azul* rule, a park owner is entitled to compensation for the interest allegedly "permanently" taken from him, even if that interest is ultimately restored to him.

Azul and *Hall* are bad law. The rules formulated in these cases are wrong because the underlying facts upon which these rules are predicated do not exist. Obviously, the real agenda of the author of *Azul* and *Hall* is the elimination of rent control. As Justice Weiner most aptly stated in *Yee*, the wisdom of rent control is a matter for the legislature, not the courts to decide (*Yee v. City of Escondido, supra*, 224 Cal.App.3d 1349, 1358).

Proposition K does not work a taking because all it does is return to the residents of mobilehome parks something which belongs to them and was taken from them by the park owners -- the right to realize on sale of their mobilehomes the equity which belongs to them. Even if the Ninth Circuit analysis is accepted and a technical taking has occurred, then the public still should not be required to reimburse mobilehome park owners for the "losses" they sustain in returning to park residents the equity in their homes which they wrongfully appropriated before the enactment of Proposition K.

Finally, while economic analysis can be helpful as a way of producing insights into the consequences of a given course of action, it is not the end-all and be-all of legal decision making. Indeed, it is only one of the many factors which this Court must consider in charting its course in this very difficult area. The human component, the cost in human suffering and displacement must also be evaluated as it impacts upon the final decision. This

component incorporates elements which cannot be quantified in economic terms. National treasure is more than dollars and cents. And consider, for example, the economic value of free speech. Weighed only by an economic scale, we would have lost our first amendment rights long ago. Similarly here, the trauma associated with the physical dislocation and/or loss of the homes of elderly lower income people is a factor which cannot be ignored by society and this Court.

CONCLUSION

By permitting unrestricted applications for rent increases, without limits either in amount or frequency, on sales of individual mobilehomes within a mobilehome park, Proposition K is distinguishable from the ordinances examined in *Hall* and *Azul*. As a direct consequence of this difference, "premiums" attributed to depressed rents cannot develop in parks subject to Proposition K or if they do, rents can be adjusted upward to eliminate the same and the benefits of rent control *will* be passed along to successive tenants.

EMPAC agrees with respondent and adopts its arguments that the taking analysis of *Hall* and *Azul* is unsound and should be rejected by the Court. However, notwithstanding *Hall* and *Azul*, the adjustment mechanisms built into Proposition K compel a different conclusion than those reached there. No taking has or can occur as a consequence of the enactment of Proposition K.

Amicus also urge this Court to recognize that the conclusions reached in *Azul* and *Hall* are based on incorrect assumptions regarding the operative price mechanisms of markets with the characteristics of mobilehome parks. Because of the hostage-like aspects of mobilehome park living, park owners are able to and *do* wield excessive economic power. If mobilehome living is to be preserved as a viable option in the low-cost housing market, the only recourse is to balance the competing interests of landlords and homeowners with equitable ordinances such as

Proposition K. This is an appropriate function of local government and is constitutional. The reasoning of *Azul* and *Hall* carried to its final conclusion will not only bankrupt numerous municipalities throughout California and the United States, it will enable park owners to destroy the economic well being of the residents of mobilehome parks everywhere.

EMPAC respectfully urges the Court to uphold Proposition K.

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Respectfully submitted,

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